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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN JESSE SWAYNIE, JR.,

Appellant-Petitioner,

VS.

STATE OF INDIANA,

Appellee-Respondent.

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No. 79A05-0602-PC-096

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Rex W. Kepner, Special Judge
Cause No. 79D01-9811-CF-126

May 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner John Jesse Swaynie, Jr., appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of trial and appellate counsel. Specifically, Swaynie argues that he was entitled to post-conviction relief because he did not have the benefit of legal counsel during a pretrial mental examination that was conducted in response to his alleged medical condition. Moreover, Swaynie is apparently claiming that his trial counsel was ineffective for failing to object to the admission of evidence that was obtained from the examination. Swaynie also asserts that his appellate counsel was ineffective for failing to challenge trial counsel's effectiveness on direct appeal. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On September 22, 1999, Swaynie was convicted of attempted murder, burglary, and confinement. The trial court merged the confinement conviction with the attempted murder conviction. Thereafter, Swaynie was sentenced to an aggregate term of seventy years. On direct appeal, our Supreme Court affirmed Swaynie's convictions and sentence on February 8, 2002. Swaynie v. State, 762 N.E.2d 112, 115 (Ind. 2002).

On September 15, 2005, Swaynie filed an amended pro se petition for post-conviction relief,¹ asserting that during his pretrial incarceration, a jail physician examined him because he was exhibiting "volatile behavior, eruptions and suspiciousness." Supplemental App. p. 346. The record shows that Swaynie was referred to another physician, Dr. Martin Abbett, who performed a subsequent mental evaluation. Swaynie's trial counsel was not informed of

¹ Swaynie initially filed for post-conviction relief on July 24, 2002.

the testing and at the time, trial counsel had already filed a notice to interpose an insanity defense. However, the trial court had not entered an order on the notice.

Following Dr. Abbert's evaluation, the trial court conducted a competency hearing. At that hearing, the court-appointed physicians relied on Dr. Abbert's prior evaluation and diagnosis of Swaynie. In light of these circumstances, Swaynie argued in his petition for post-conviction relief that

[i]t follows logically that Swaynie, being unaware of the insanity defense, was confronted with the intricacies of the law when he submitted to the Feb. 12, 1999 evaluation. Without the assistance of counsel, Swaynie was not aware of the precise scope, the nuances and the boundaries of that result from a filing of a plea of insanity. As the record indicates, defense counsel, being unaware of the Feb. 12, 1999 evaluation, gave no legal advice to Swaynie concerning the evaluation, its results and its effect on the insanity defense.

Id. at 349. Swaynie thus asserted that he was denied the effective assistance of trial counsel because his attorney failed to represent him at a "critical stage of the proceedings" when he was evaluated by Dr. Abbert. Id. at 351.

The post-conviction court reviewed Swaynie's petition and the State's answer and determined that there "are no facts alleged" that supported Swaynie's claim for relief. Id. at 373. In its order, the post-conviction court observed that medical care received from a jail physician, including a mental examination "as recommended by [the jail's] physician," does not constitute a "critical stage" of the proceedings that requires a right to counsel. Id. at 375. In denying Swaynie's request for relief, the post-conviction court also observed that

- 1) To subject an inmate that is volatile and causing disruptions to a psychiatric examination is not a critical stage of the proceedings. Mr. Swaynie caused disruptions and disturbances to the point of needing medical attention in the form of a mental evaluation. Such evaluation is no

different than administering a doctor's care for an inmate that has received a physical injury. The penal facility has a duty and obligation to provide appropriate care to inmates, whether the need is physical or mental. The facility would [be] remiss in failing to obtain appropriate care of an inmate to remedy outbursts and violent behavior, thereby subjecting other inmates to potential harm. In such a circumstance, the facility is providing care as recommended by its [sic] physician and should not ask an attorney if physical or mental care should be provided. It is not a critical stage of the proceedings whereby an inmate has the right to have an attorney present.

- 2) This issue was known or available prior to the Appeal of this case. The issue was not raised on Appeal and was therefore waived.
- 3) This issue was known or available by trial counsel, prior to trial. The Defendant and trial counsel nonetheless placed the Defendant's mental condition at issue by raising the insanity defense. The petitioner now complains about evidence that was available at trial because of the insanity defense, which only the Defendant can raise. It was within the Defendant's control whether to put his mental condition at issue and therefore waive the privilege that would otherwise protect the very communication of which he now complains came into evidence.
- 4) Appellate counsel cannot be ineffective for failing to raise an Appellate issue that would inherently fail. Again, the communications to Dr. Abbert did not occur at a time or circumstance where counsel should be or had a right to be present. In addition, by placing the Defendant's state of mind in issue and waiving the physician or psychiatrist privilege, an Appeal on the issue presented by this petition for post-conviction relief would fail as a matter of law. Therefore, on the Pleadings of this Petition the Court finds no ineffective assistance of Appellate Counsel for failing to appeal the psychiatric care and evaluation given without counsel present.

Swaynie now appeals.

DISCUSSION AND DECISION

I. Standard of Review

As we consider Swaynie's argument that the post-conviction court improperly denied his petition, we observe that the petitioner in a post-conviction proceeding bears the burden

of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Swaynie’s Claims

At the outset, it is not abundantly clear to us whether Swaynie’s claim sounds in ineffective assistance of counsel or in a denial of trial counsel. Inasmuch as a denial of counsel claim would have been available to Swaynie on direct appeal, it is now waived. Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002) (observing that claims available on direct appeal but not presented are not available for post-conviction review); see also Latta v. State, 743 N.E.2d 1121, 1132 (Ind. 2001) (recognizing that even fundamental error analysis has no application in post-conviction proceedings). However, to the extent that Swaynie has raised a valid ineffective assistance of counsel claim, his argument seems to be premised upon trial counsel’s failure to object at trial to evidence that was obtained from the mental examination prior to trial.

A. Trial Counsel

We review claims of ineffective assistance of counsel based upon the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Specifically,

[a] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting Strickland, 466 U.S. at 694).

The Sixth Amendment to the United States Constitution requires the assistance of counsel at all critical stages of the criminal proceedings. Hernandez v. State, 761 N.E.2d 845, 849 (Ind. 2002) (citing United States v. Cronin, 466 U.S. 648, 659 (1984)). The right to the assistance of counsel is so essential that prejudice is presumed when there is actual or constructive denial of the assistance of counsel. Hernandez, 761 N.E.2d at 849. However, the United States Supreme Court has held that the denial of this constitutional right is "subject to a harmless error analysis unless the deprivation, by its very nature, cannot be harmless." Rushen v. Spain, 464 U.S. 114, 117-18 n.2 (1983).

The right to the assistance of counsel at a critical point in the trial encompasses "any stage of the prosecution where counsel's absence might derogate his right to a fair trial." Id. at 850. Such a stage occurs when (1) incrimination may occur or (2) the opportunity for effective defense must be seized or be forgone. Id. More recently, our Supreme Court formulated the test for identifying a "critical stage" of the proceedings: "whether the

defendant is confronted with the intricacies of the law or the advocacy of the public prosecutor or prosecuting authorities.” Id.

In this case, Swaynie asserted in his petition for post-conviction relief that he was subjected to medical treatment by a physician at the jail and then referred to Dr. Abbett for a mental evaluation while awaiting trial. Supp. App. 346-47. As the post-conviction court determined, this evaluation was a necessary medical treatment during a psychiatric crisis that Swaynie experienced while incarcerated. In our view, such inmate medical care is separate from trial proceedings and it would be unreasonable and overly burdensome to require the State to inform an inmate’s legal counsel whenever medical attention is required. Moreover, our Supreme Court specifically determined in Williams v. State, 555 N.E.2d 133, 136 (Ind. 1990), that a court-ordered mental evaluation following an insanity plea is not a critical stage that requires representation.

Swaynie suggests that his trial counsel was at least required to be notified of a mental health evaluation where any information could be used at trial in light of Estelle v. Smith, 451 U.S. 454, 469 (1981), but the Estelle court did not address that issue. Furthermore, Swaynie’s medical evaluations without the presence of his legal counsel did not occur as the result of a court order or as part of the trial proceedings. Although the results and any admissions from a jail mental examination could conceivably be admitted at a later trial where a defendant has raised the defense of insanity, such a result is reasonable, inasmuch as a defendant must deliberately raise the defense of insanity. In such an instance, the defendant has purposefully chosen to waive the doctor-patient privilege. Therefore, under these

circumstances, Swaynie has failed to show that his trial counsel's absence and the failure to object to evidence obtained from the mental evaluations constituted deficient performance on the part of his trial counsel.

Finally, we note that while Swaynie relies on the trial transcript to support his ineffective assistance of counsel claims, the trial transcript was not admitted into evidence at the post-conviction proceedings. Generally, a trial transcript must be entered into evidence in the same manner as any other exhibit. See Jackson v. State, 830 N.E.2d 920, 922 (Ind. Ct. App. 2005) (observing that on collateral review, it is presumed that a judgment was entered validly, and the defendant should bear the burden of forwarding evidence of invalidity or a constitutional violation). Because Swaynie had the burden to present the record of the proceedings to support his argument and has failed to do so, we further conclude that the post-conviction court properly denied Swaynie's "Request to have Original Record of Proceedings Removed from the Custody of the Clerk of the Supreme Court and Court of Appeals of Indiana, Submitted to the Trial Court and Received Into Evidence as an Exhibit in Post-Conviction Relief Proceedings." Supp. App. p. 357-58. Thus, based on the complete lack of evidence establishing the effect of the alleged inadequate assistance of trial counsel, Swaynie has also failed to support his claim under the prejudice prong announced in Strickland. Thus, Swaynie's ineffective assistance of trial counsel claim fails.

B. Appellate Counsel

Swaynie also argues that he is entitled to post-conviction relief because his counsel on direct appeal failed to argue that his trial counsel was ineffective with regard to the mental

examinations. The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel. Trueblood v. State, 715 N.E.2d 1242, 1256 (Ind. 1999). The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). Thus, we give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999).

In this case, because we have determined that Swaynie's trial counsel was not ineffective, we similarly conclude that Swaynie does not prevail on his ineffective assistance of appellate counsel claim.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.